UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JOSEPH C. MELFI	:	
	:	
v.	:	C.A. No. 08-24ML
	:	
WMC MORTGAGE CORPORATION,	:	
et al.	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter is presently before the Court on the Motion to Dismiss (Document No. 11) filed by Defendants Wells Fargo Bank N.A., and Deutsche Bank National Trust Company, N.A., as Trustee of Morgan Stanley ABS Capital I, Inc., Asset Backed Pass Through Certificates Series 2006-WMC2 Under the Pooling and Servicing Agreement Without Recourse (collectively the "Defendants"). Defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that Plaintiff Joseph Melfi's ("Melfi") Complaint fails to present a cognizable claim under the Federal Truth in Lending Act, 15 U.S.C. § 1601, et seq. ("TILA"). Melfi filed an Objection to Defendants' Motion to Dismiss. (Document No. 17).

Defendants' Motion to Dismiss has been referred to me for preliminary review, findings and recommended disposition. See 28 U.S.C. § 636(b)(1)(B); LR Cv 72. Defendants have not requested oral argument (LR Cv 7(e)), and the Court concludes that oral argument is not necessary to the resolution of this Motion. After reviewing the Motion, the Objection and the relevant legal authority, this Court recommends that Defendants' Motion to Dismiss (Document No. 11) be DENIED.

Background

Melfi commenced this TILA litigation against WMC Mortgage Corporation and its successor-in-interest Morgan Stanley ABS Capital I, Inc. (collectively "WMC") on January 17, 2008. (Document No. 1). In particular, Melfi alleged a violation of 15 U.S.C. § 1635 and 12 C.F.R. § 226.23 due to an "incomplete and defective" rescission notice. Id., ¶ 19. Melfi attached an unsigned and not fully completed "Notice of Right to Cancel" as Exhibit 1 to the Complaint. Id., ¶ 6.

WMC answered and counterclaimed on February 5, 2008. (Document No. 2). WMC's Answer does not specifically address Exhibit 1 to Melfi's Complaint. Id., ¶ 6. Rather, in its counterclaim for Declaratory Judgment, WMC alleges that it provided Melfi with the required rescission notice. Id., Counterclaim ¶ 4. WMC attached to its Counterclaim, as Exhibits B and C, two fully completed "Notice of Right to Cancel" forms purportedly signed on April 7, 2006 by the Melfis. Id., Exs. B and C. In his Answer to WMC's Counterclaim, Melfi denies the allegations referencing Exhibits B and C and does not otherwise admit to the authenticity of these documents. (Document No. 5 at ¶¶ 2, 5).

On April 7, 2008, Melfi was granted leave to amend his Complaint to add the full and correct legal names of the entities holding his loan. Defendants did not answer the Amended Complaint. Rather, they filed the instant Motion under Fed. R. Civ. P. 12(b)(6) and attached, as Exhibit A, the same notices referenced in WMC's Counterclaim as Exhibits B and C.

Standard of Review

In ruling on a motion to dismiss pursuant to Rule 12(b), the Court construes the complaint in the light most favorable to the plaintiff, see Greater Providence MRI Ltd. P'ship v. Med. Imaging Network of S. New England, Inc., 32 F. Supp. 2d 491, 493 (D.R.I. 1998); Paradis v. Aetna Cas. & Sur. Co., 796 F. Supp. 59, 61 (D.R.I. 1992), taking all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences, see Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002); Carreiro v. Rhodes Gill and Co., 68 F.3d 1443, 1446 (1st Cir. 1995); Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994). If under any theory the allegations are sufficient to state a cause of action in accordance with the law, the motion to dismiss must be denied. See Hart v. Mazur, 903 F. Supp. 277, 279 (D.R.I. 1995). The Court "should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts." Roma Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996); accord Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Arruda, 310 F.3d at 18 ("[W]e will affirm a Rule 12(b)(6) dismissal only if 'the factual averments do not justify recovery on some theory adumbrated in the complaint.'"). Exhibits to a complaint are considered part of the pleading for purposes of a motion to dismiss. See Fed. R. Civ. P. 10(c); Blackstone Realty LLC v. FDIC, 244 F.3d 193, 195 (1st Cir. 2001) (written offer attached to complaint is part of the pleading for purposes of a motion under Fed. R. Civ. P. 12(b)(6)).

Discussion

The first issue is Defendants' attempt to expand the record beyond the "four corners" of Melfi's Amended Complaint. As discussed above, Defendants' primary argument for dismissal relies heavily on two documents attached as Exhibit A to their Motion. (See Document No. 11). However, these particular documents are not attached to Melfi's Amended Complaint or explicitly incorporated by reference. In fact, Melfi's Answer to the Counterclaim denied the allegations referencing these documents (Document No. 5 at ¶¶ 2, 5) and he argues that "[i]t is grossly improper for Defendants to attach some extraneous document, the content of which is disputed by the parties yet central to the claim for rescission...." (Document No. 18 at 2).

Under TILA, a borrower has a right to rescind a loan secured by a principal dwelling within three business days of the loan "consummation," i.e., closing or three business days from delivery of the material disclosures, whichever is later. 15 U.S.C. § 1635(a). The lender must "clearly and conspicuously" notify a borrower of the right to rescind and how to exercise that right. 12 C.F.R. § 226.23(b)(1). If the required notice is not "delivered," the right to rescind extends to a three-year period. 12 C.F.R. § 226.23(a)(3). Finally, "a misleading disclosure" may violate the notice provisions of TILA. Barnes v. Fleet Nat'l Bank, 370 F.3d 164, 174 (1st Cir. 2004).

Relying on Exhibit A, Defendants argue that the "Notice of Right to Cancel provided to, and signed by Plaintiff, on the date of the loan transaction disclosed all required TILA information." (Document No. 11 at 4). Thus, Defendants contend that Melfi fails to state a claim under TILA, and dismissal under Fed. R. Civ. P. 12(b)(6) is warranted. Generally, a Rule 12(b)(6) challenge is evaluated within the "four corners" of the complaint. However, the First Circuit has held that extraneous documents may be considered if they are "documents the authenticity of which are not disputed by the parties;...documents central to plaintiff's claim; [and] documents sufficiently referred to in the complaint." Chmielinski v. Massachusetts, 513 F.3d 309, 312 n.1 (1st Cir. 2008). See also Palmer v. Champion Mortgage, 465 F.3d 24, 28 (1st Cir. 2006) (In a TILA action, a notice "annexed" to a complaint by a plaintiff is "deemed fair game on a motion to dismiss.").

Contrary to Defendants' position, this Court does not consider the documents introduced by Defendants (Exhibit A to Document No. 11) to be "fair game" for consideration at this preliminary stage. This issue was considered on nearly identical facts in Reese v. Hammer Fin. Corp., No. 99 C 0716, 1999 WL 1101677 (N.D. Ill. Nov. 30, 1999). In Reese, Plaintiffs appended an unsigned and undated notice of right to cancel to their complaint. As in this case, the defendants countered with a motion under Fed. R. Civ. P. 12(b)(6) and attached a copy of a signed and dated notice of right to cancel. The Court refused to consider the document proffered by the defendants and reasoned:

> Indeed, the [plaintiffs] have attached to their Complaint the document "central" to their improper notice claim-namely, an unsigned Notice of Right to Cancel which they allege violates TILA's cancellation notice requirements. Although the signed Notice of Right to Cancel attached to the motion to dismiss may be "central" to [defendants'] defense of the [plaintiff's] allegations, it does not meet the narrow exception of documents considered part of the pleadings. Instead, it merely raises questions regarding the factual circumstances surrounding the delivery of the Notice of Right to Cancel to the [plaintiffs]-questions which would be inappropriate for this Court to pursue in this motion to dismiss.

Id. at *3.

This Court agrees with and adopts the well-reasoned analysis in Reese. The particular documents proffered by Defendants in this case are not attached to Melfi's pleadings or specifically referenced therein. In fact, they are disputed by Melfi and central to Defendants' defense, not Melfi's claim. The Court also finds that it will be more efficient and orderly to deny Defendants' Motion as opposed to converting it to one for summary judgment pursuant to Fed. R. Civ. P. 12(d) given that this case is in its infancy.

Defendants alternatively argue that even if Exhibit A is excluded, the unsigned/undated Notice Form attached to Melfi's Amended Complaint complies with TILA. Although Melfi pleads that he "received or signed" certain documents in connection with the loan transaction in question, including the cancellation notices attached to his Complaint, he does not allege exactly when or how he "received" the cancellation notices. (Document No. 7-3 at ¶ 6). Also, the record does not include any other factual context as to the loan transaction. Defendants invite the Court to weigh in on the legal issue of whether the failure to include an actual date of expiration renders the notice legally inadequate under TILA. However, Defendants' primary argument is that Melfi signed and received two copies of the notice which included an actual expiration date. If Defendants' representation ultimately bears out, then they are asking the Court to weigh in on a legal issue which is not actually present in this case. In other words, they are effectively seeking an advisory opinion. Since the factual record is disputed and this Court recommends rejecting Defendants' attempt to expand review beyond the Complaint, the better course of action is to permit a limited period of discovery to complete the factual record and ferret out the actual facts in genuine dispute, if any. If appropriate, Defendants may thereafter present their arguments in the context of Fed. R. Civ. P. 56.

Conclusion

For the reasons discussed above, I recommend that Defendants' Motion to Dismiss (Document No. 11) be DENIED. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 11, 2008